

SPECIAL POINTS OF INTEREST:

- Register for the NCPJ Spring Conference in San Diego, California, May 2nd through the 5th.
- Nominate a person dedicated to improving guardianship laws for the Isabella Award

INSIDE THIS ISSUE:

- From the Desk of the President
- Presentation of the Treat Award for Excellence
- 2018 NCPJ Spring Conference
- Finding Lady Justice's Voice
- Overcoming Presumptions in Joint Accounts

From the Desk of the President

It is April and I am continuing to wait for the flowers to bloom and the sun to shine. It continues to snow in many of our northern cities, and we are still wearing jackets in places we least expect. Likewise, our dockets persist in being full, as we see the effects of the silver tsunami.

I find it an honor and privilege to represent you as the President of the National College of Probate Judges. The Executive Committee has been steadfast in revising our bylaws, developing a new website for online registration, collaborating with other national organizations, and working with our state representatives to offer innovative ways to increase the participation of our members. It is our goal to assess how we can better network and

strengthen our effectiveness in our individual, challenged communities.



**Hon. Tamara C Curry,
President of NCPJ**

Given technological advances, courts will continue to encounter diverse and novel issues. NCPJ plans to offer cutting edge

programs to address current cases and issues that we may encounter relating to email and electronic signatures on estate documents. Recently, we have seen complex litigation related to digital wills, powers of attorney, and the binding effect of these documents in probate. Similarly, it is foreseeable that issues related to ownership rights of digital assets likely should be addressed. NCPJ will make every effort to provide knowledgeable and expert speakers from around the country to train our judges as we rise to challenges.

As President of NCPJ, my mission is to educate and make resources available to judges to increase access to and the quality of our courts. ■

Tamara C. Curry

Finding Lady Justice's Voice

By Trisha S. Widowfield, Esq.

Lady Justice is likely one of the most recognized legal symbols depicting the fair and equal administration of the law. The concept of a woman portraying Justice dates back to Themis, the Greek goddess of justice and law. While Lady Justice has adorned many courthouses and government buildings for centuries, female litigators continue battling to attain more prominent roles within those courthouses.

It's not a new story by any means. Indeed, there have been many studies and task forces

throughout the years examining the role of female attorneys in court, most with negative conclusions. The problem is really two-fold. First, and most important, females are not being given adequate opportunities to present in court. A 2015 docket study by Stephanie A. Scharf and Roberta D. Liebenberg and supported by the American Bar Association's Commission on Women in the Profession and the American Bar Association reviewed all cases filed in 2013 in the Northern Dis-

(to be continued on page 2)

Lady Justice (continued from page 1)



Lady Justice originates from the personification of justice in Roman art known as Justitia who is equivalent to the Greek goddess, Themis. She is often blindfolded with a sword and balance in hand.

tract of Illinois. It found that 68% of attorneys who filed appearances in civil cases were men. Seventy-six percent of those identified as lead counsel were men, and 73% of trial counsel were also men. Those statistics indicate that men are almost three times more likely to be lead counsel or trial counsel than women. A

2016 ad hoc task force of the commercial and federal sections of the New York State Bar Association indicated New York has similar statistics, as reported by Carrie H. Cohen in a 2017 New York Bar Journal article. These statistics seem to support what female litigators experience on a daily basis. It is certainly disappointing and, to many, intimidating to be the only female attorney arguing in court or presenting at trial.

Second, females experience gender bias when they do make it into the courtroom in a lead role. Implicit bias encompasses unconscious attitudes or stereotypes that affect people's understanding, decision-making, and behavior. Female attorneys experience this implicit bias from all directions—opposing counsel, judges, and jurors. Examples include being mistaken for a paralegal or court reporter; called “honey” or “sweetheart”; critiqued for sounding too aggressive or shrill; and ignored or treated in a condescending way. Connie Lee, in her 2016 article for the *Cardozo Journal for Law and Gender*, reported that Kat Macfarlane, an assistant law professor at LSU Law Center, stated, “women in the public sphere who argue cases in federal court . . . already find themselves ‘sitting at the table’ But once they’ve taken their seats, they still aren’t recognized as legitimate speakers.”

Attorney stereotypes include behaviors that are assertive, dominant, competitive, and argumentative. Most litigators, male or female, would probably agree that they embody some, if not all, of these traits. It is part of the “trial lawyer” personality and make-up. Unfortunately, these are also stereotypically male traits. Stereotypical feminine traits, on the other hand,

usually include more passive behaviors, such as sensitivity and nurturing. Given these stereotypes, when a female attorney acts in a way that is stereotypical of a litigator, she can be perceived as abrasive and aggressive while her male counterpart is perceived as being assertive and commanding. Overall, Connie Lee points to studies which find that aggressive attorneys are more successful than passive attorneys. However, female attorneys must consider this implicit bias when developing their courtroom style.

A female attorney can command the courtroom and successfully advocate on behalf of her clients but it requires a delicate straddle between the trial lawyer persona and the traditional female traits. As such, female attorneys need more female role models to help them develop and improve their trial advocacy skills. Unfortunately, the opportunity for the development of those trial skills is significantly lower across the board since most cases resolve before reaching the courtroom.

Many agree that it is time to stop talking about the statistics and start taking action to remedy the problem. The solution should be a multi-level effort including participation from attorneys, law firms, bar associations, and the judiciary. To address the disparity in lead roles in court, female attorneys need to be more assertive. If a female attorney is the one who prepares the written motion, she should ask to be the one to take the lead arguing it in the courtroom. Certainly, the skill set and competence of the female attorney are not in question, as the firm and client relied on her to research and draft the motion. She simply needs to advance her courtroom skills and the logical place to start is by arguing the motions she develops and drafts. Further, in preparing her order of proof for trial, the attorney should identify either the issues or the witnesses that she is prepared to present with the legitimate reasons as to why (i.e. she has been the “go-to” person on that issue throughout the pendency of the case or she has been the one most involved with that witness). The most essential step the attorney can take is to research prospective firms before accepting a position to

(to be continued page 4)

Overcoming Presumptions in Joint Accounts

By Margaret Howell Up De Graff and Jill Renee Kroamer

I. Introduction

It is not uncommon for a person of advanced age, or otherwise, to end up adding other people to their bank accounts. There are many reasons to do this—convenience, marriage, lack of mobility, busy schedules, to name a few. In most cases, the original account holder tends to be the person who contributes all of the funds. While all parties associated with the account are alive, their share of the account is generally determined based upon their contribution to the account, except in certain jurisdictions, such as community property states. But what happens when one of the account holders dies? Banking regulations tend to favor the presumption that the surviving parties named on the account are the new owners of the account.

In many jurisdictions this presumption of right of survivorship is also favored. As is often the case, the probate court does not even know about these assets, since joint accounts are so often used as a form of non-probate transfer. Nonetheless, if the personal representative or other interested persons have reason to believe that the decedent did not intend to leave all such assets to the joint account holder(s), the accounts become the courts' problem one way or another. As famously explained by the Supreme Court of Rhode Island in the 2011 case of *McManus v. McManus*, “[i]t has been facetiously noted that there are two ways to start a civil action in this state. The first is pursuant to Super.R.Civ.P. 3, and the second is by opening a joint bank account with right of survivorship.” This article seeks to summarize the issues involved with claims related to joint account ownership—in particular, how a sampling of jurisdictions chooses to treat such property, and where burdens of proof exist, how to overcome the presumption of survivorship.

II. The Uniform Probate Code

The Uniform Probate Code’s position on Joint Accounts also favors the presumption of

survivorship. Uniform Probate Code Section 6-104 provides that, “[s]ums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. If there are two (2) or more surviving parties, their respective ownerships during lifetime shall be in proportion to their previous ownership interests under Section 6-103 augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before his death; and the right of survivorship continues between the surviving parties.” Based on this Section, in conjunction with Section 101(4) of such Code, an account that is payable to one or more parties is a survivorship arrangement “unless clear and convincing evidence of a different intention” is provided. The comments clearly lay out that there is a presumption that a majority of persons who use joint accounts “want the survivor or survivors to have all balances remaining at death.”

“It is not uncommon for a person of advanced age, or otherwise, to end up adding other people to their bank accounts. There are many reasons to do this—convenience, marriage, lack of mobility, busy schedules, to name a few.”



(to be continued on page 6)

Presentation of the Treat Award for Excellence

In 1978 the Treat Award was established in honor of Judge William W. Treat, founder and President-Emeritus of the National College of Probate Judges. The Treat Award for Excellence was established to recognize and encourage achievements in the area of probate law. Each year the College honors an individual who has made a significant contribution to probate law or administration in the area of probate. At the NCPJ 2017 Fall Conference in Ponte Vedra Beach, Florida, Judge Dana Hanley was the Treat Award recipient for 2017.

Judge Dana Hanley has served as a probate judge in the State of Maine for 20 years. Several years ago, Judge Hanley was asked to undertake the unification and standardization of the 16 autonomous probate courts in Maine. Judge Hanley believed implementing an e-filing system could achieve those goals. The implementation of the e-filing system turned out to be an 8 year project.

To achieve the goal of a statewide e-filing system in probate, Judge Hanley dedicated no less than 1000 hours to the project that included the following:

- Bringing together all of the stakeholders for monthly meetings;
- Negotiating a contract for the development of the software for an e-filing system; and
- Obtaining the backing and key support of the Maine Supreme Court and Probate Judges Assembly.

The implementation of the e-filing system has improved Maine's probate administration by promoting uniformity and streamlining case initiation for the public, attorneys and court staff. Remarkably, Judge Hanley achieved the implementation of the e-filing system with no cost to the State of Maine.

Lady Justice (continued from page 2)

allow her to find a firm that is committed to the development, progression, and advancement of female litigators.

Law firms also need to recognize the investment they have already made in developing their female attorneys and provide the requisite opportunities for them to hone their skills by giving them a prominent seat at the table in the courtroom. Further, if a client tries to insist that a male attorney take the lead, firms need to take the stance that the attorney involved in writing the motion or in working up the case is the most prepared and most appropriate to argue their position in court. Judges have often noted that female attorneys tend to be better prepared and more likely to follow the court's rules than their male counterparts. This might be due to the need to work harder to earn the respect of their opposing counsel, clients, and the judge.

Judges have given anecdotal examples of seeing a female who obviously prepared the written motion passing notes or looking



NCPJ President, Hon. Rita Cobb, presenting the Treat Award for Excellence to Hon. Dana Hanley, Probate Judge in the State of Maine

In recognizing Judge Hanley's efforts, the Maine Estate Planning Council stated: "Judge Hanley has continued his quest for efficiency in government by being the lead proponent of putting the Probate Court's documents and records on the internet. Judge Hanley, with other Judges and Registers across the state were able to complete this, saving the counties untold millions of dollars and brought the Maine Probate Court into the 21st century." NCPJ was honored to present the 2017 Treat Award for Excellence to Judge Dana Hanley. ■

frustrated when their carefully crafted written argument is not articulated as well by their male counterparts who are making the oral argument in the courtroom. In fairness, judges should then ask questions of the female attorney to gain her superior familiarity with the argument. Providing the opportunity for the female to showcase her courtroom knowledge and skills that were otherwise thwarted will provide her confidence in presenting the next time around. Further, when female attorneys are excluded from leading roles in the courtroom, judges need to confront it. Sarah Zabel, Judge of the Circuit Court in and for Miami-Dade County, Florida, recently related an experience in which she called a sidebar at trial. All of the male attorneys approached the bench, but the female attorney, who was second chair during the trial, remained seated. Rather than just addressing the male attorneys, Judge Zabel called the female attorney to the sidebar and reminded her that she had a role in the case and was entitled to be involved.

(to be continued page 11)

NCPJ Spring Conference in San Diego, California

Please join us for our 2018 NCPJ Spring Conference in beautiful San Diego, California. The site of our conference will be the gorgeous four star luxury resort at Rancho Bernardo Inn which offers world-class amenities to its guests. We are pleased to have secured very favorable group rates for a block of rooms for our NCPJ members. In addition, registrants who attend our conveniently scheduled educational sessions will earn a full 9 hours of CLE credit, thereby combining professional advancement concurrently with a most enjoyable and memorable cultural experience.

The conference will begin Wednesday, May 2, 2018, with a reception for new members and first-time attendees and guests from 5:30 p.m. to 6:00 p.m. at the Rancho Bernardo Inn, followed by a welcome reception for all members and guests from 6:00 to 7:00 p.m.

The curriculum co-chairs, Judges Brenda Thompson and Amy McCulloch, have developed an informative and engaging program for our spring conference in beautiful San Diego, California. On Thursday, May 3rd, the agenda includes a presentation on the Untapped Power of Assisted Outpatient Treatment Law by Judge Elinore Marsh Stormer of the Summit County Probate Court and Brian Stettin, Policy Director of the Treatment Advocacy Center. On Friday, May 4th, John T. Rogers, Jr., California State Chair of the American College of Trusts and Estate Counsel, will present a seminar entitled "Reply All or Not to Reply All—That May Be An Ethics Question." Mark Mapstone, PhD, Professor, Department of Neurology, Institute for Memory Impairments and Neurological Disorders, University of California, Irvine, will also be presenting on Friday on issues in dementia and Alzheimer's disease relevant to probate, as well as Peter Polumbo and Darryl Lynch of the Oppenheimer Fund. On Saturday, May 5th, the agenda will include a variety of topics.

ACCOMMODATIONS: NCPJ has negotiated a conference rate of \$199.00 single/double plus tax. There is a \$25 per day resort fee to cover amenities, including WiFi. The resort has waived the \$25 per day parking fee for our group. These rates are offered three days before and after the meeting dates, subject to availability. The cut-off date to make reservations is April 4, 2018, but you are strongly encouraged to make your reservations before then, as it is very likely the NCPJ room block will fill. You may call the Rancho Bernardo Inn at: (800) 542-6096 to make your reservation, or use the Inn's online reservation link.



Mission San Diego de Alcalá
Established 1769
San Diego, California

REGISTRATION: The conference registration fee is \$400.00 for members if received by April 17 and \$450.00 after April 17. The fee for retired judges is \$300.00. The registration fee includes all conference materials, the welcome reception and final reception/banquet. The fee for spouses/guests is \$80.00, which includes the reception and banquet. The dress code for the conference is casual; dress code for the banquet is business casual.

TRANSPORTATION: Rancho Bernardo, located in North San Diego, is a 30-40 minute drive from San Diego International Airport (SAN), served by major domestic carriers. Transportation from the Inn to downtown is by car, Uber, Lyft or Super Shuttle.

ACTIVITIES: The Rancho Bernardo Inn is reminiscent of a country estate and offers spacious lodgings in a spectacular setting. Fine dining, a full-service spa and a magnificent golf course are offered at the Inn. A short 1.5 miles from the Inn is the Bernardo Winery with a wine tasting room as well as roasting their own award winning coffee.

Complimentary tasting cards are available from the Inn. Other nearby wineries are the Orfila Vineyards, Cordiano Winery, and Hungry Hawk Vineyards. Fifteen minutes away is the 1800-acre Safari Park. Admission includes an open-air safari tram tour. In Old Town San Diego, there

is a popular, two hour hop on/hop off trolley that travels a 25-mile long loop that highlights some of San Diego's most popular destinations. You can also wander along the Embarcadero, San Diego's waterfront with public art, military memorials and marine attractions in a pedestrian friendly area and explore Balboa Park (1549 El Prado), which hosts stunning examples of Spanish Colonial Revival architecture and is the site of both the San Diego Building of Man (1350 El Prado) and the Mingei International Museum (1439 El Prado). The San Diego harbor is always a center of activity, with the Coronado Island ferry providing a short ride to Coronado Beach, and the USS Midway Museum (910 Harbor Dr.) filled with many interactive exhibits. Of course, there is also the world-famous San Diego Zoo (2920 Zoo Drive), about 40 minutes away with more than 4,000 animals.

Please join us and many other judges and probate professionals from all across America for this most enjoyable and educational experience in lovely San Diego, California, from May 2 through May 5, 2018. We look forward to seeing you. ■

Joint Accounts (continued from page 3)

III. Uniform Multiple-Persons Accounts Act

The Uniform Multiple-Person Accounts Act encourages the use of forms by financial institutions to clarify ownership or lack of ownership, by using designations such as agency (eg: convenience) or pay on death (POD), as well as a specific designation of survivorship or non-survivorship. The Uniform Multiple-Person Accounts Act was integrated in Sections 6-201 through 6-227 of the Uniform Probate Code.

Pursuant to Article I, Section 4 of this Act, if an account contract of deposit contains provisions in substantially the following form, then the form will establish the type of account provided, thus allowing for the account to be governed by the provisions of this Act which apply to that particular account type. The prescribed form is as follows:

UNIFORM SINGLE- OR MULTIPLE-PARTY ACCOUNT FORM

PARTIES [Name One or More Parties]:

_____ OWNERSHIP [Select One And Initial]:

_____ SINGLE-PARTY ACCOUNT

_____ MULTIPLE-PARTY ACCOUNT

Parties own account in proportion to net contributions unless there is clear and convincing evidence of a different intent.

RIGHTS AT DEATH [Select One And Initial]:

_____ SINGLE-PARTY ACCOUNT

At death of party, ownership passes as part of party's estate.

_____ SINGLE-PARTY ACCOUNT WITH POD (PAY ON DEATH)

DESIGNATION

[Name One Or More Beneficiaries]:

At death of party, ownership passes to POD beneficiaries and is not part of party's estate.

_____ MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP

At death of party, ownership passes to surviving parties.

_____ MULTIPLE-PARTY ACCOUNT WITH

RIGHT OF SURVIVORSHIP AND POD (PAY ON DEATH) DESIGNATION

[Name One Or More Beneficiaries]:

At death of last surviving party, ownership passes to POD beneficiaries and is not part of last surviving party's estate.

_____ MULTIPLE-PARTY ACCOUNT WITHOUT RIGHT OF SURVIVORSHIP

At death of party, deceased party's ownership passes as part of deceased party's estate.

AGENCY (POWER OF ATTORNEY) DESIGNATION [Optional]

Agents may make account transactions for parties but have no ownership or rights at death unless named as POD beneficiaries.

[To Add Agency Designation To Account, Name One Or More Agents]:

[Select One And Initial]:

_____ AGENCY DESIGNATION SURVIVES DISABILITY OR INCAPACITY OF PARTIES

_____ AGENCY DESIGNATION TERMINATES ON DISABILITY OR INCAPACITY OF PARTIES

It is worth noting that pursuant to Section 4 (b) of the same Article of the Act, if an account contract of deposit is not on the prescribed form outlined in subsection (a) or does not contain provisions in a substantially similar format, then the account type will be determined based on the applicable section of the Act that most nearly matches the intent of the depositor.

Section 11(b) of the Act dictates that during the lifetime of the parties, the sums on deposit in a multiple party account belong to the parties proportionally to their net contribution, absent clear and convincing evidence of a contrary intent. In addition, it is presumed that married parties contributed to the account in equal amounts, unless otherwise proven.

Section 12 of the Act governs parties' rights to the proceeds upon the death of one of the multiple party account holders. In the event of

(to be continued on page 7)

“The Uniform Multiple-Person Accounts Act encourages the use of forms by financial institutions to clarify ownership or lack of ownership, by using designations such as agency or pay on death (POD), as well as a specific designation of survivorship or non-survivorship.”

the death of a person listed on a multiple party account, the sums on deposit in the account belong to the surviving account holder(s). If one of the surviving parties is the surviving spouse of the decedent, then the spouse is entitled to that amount that the decedent would have been beneficially entitled to immediately before death, and as prescribed in Section 11. If none of the surviving parties are the surviving spouse of the decedent, then their share of the account is by default, equal, unless otherwise augmented by their own contributions prior to the death of the account holder in question. Further, the right of survivorship will continue as between the surviving parties.

Pursuant to Section 12(c), if the account does not specifically designate a right of survivorship, then upon the death of a party, the sums on deposit in the account are not affected by the death of a party, and thus do not pass to the other account holders, but rather, the amount which the decedent would have been entitled to immediately before death is then transferred to his estate.

Section 13(a) of the Act allows alteration of the terms of the account by use of a notice signed by the party and provided to the financial institution, which changes the terms of the account. Such notice is only effective if received by the financial institution during the party's lifetime. It is worth noting that in accordance with Section 13(b) of the Act, a right of survivorship as determined by the express terms of the account, or under Section 12, may not be altered by a will. This is in contrast to some of the states' statutes, which expressly require that clear and convincing evidence of intent actually stems from the will itself.

IV. Overcoming Presumption by Clear and Convincing Evidence

A. South Carolina

Prior to the adoption of the 1989 Uniform Probate Code, South Carolina applied the presumption that "when a deposit has been made in a bank . . . in the names of two or more persons . . . the deposit or any part thereof may be paid to any of the persons, whether the other or others are living or not." The South Carolina Supreme Court in the 1978 case of *Johnson v. Herrin* interpreted section 34-11-10 "to create a rebuttable presumption that the account holders intended the funds in the account to be a gift to the survivor." However, following the enactment of the revised Uniform Probate Code, Section 34-11-10 became subject to the South Carolina Probate Code.

Currently, South Carolina's Probate Code dictates that "sums on deposit in a multiple-party account belong to the surviving party or parties. If two or more parties survive and one is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under Section 62-6-201 belongs to the surviving spouse. If two or more parties survive and none is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under Section 62-6-201 belongs to the surviving parties in equal shares." However, if a multi-party account "by the terms of the account, is without right of survivorship, it is not affected by the death of a party, but the amount to which the decedent, im-

mediately before death, was beneficially entitled under Section 62-6-201 is transferred as part of the decedent's estate."

The rights, whether survivorship rights or non-survivorship rights, are determined by the terms listed on the account at the time of death. These terms may be altered by the submission of a written notice, signed by the party, submitted to the financial institution during the lifetime of the party that changes the terms of the account. In the alternative, a survivorship right, arising from the terms of the account, may be "altered by clear and convincing evidence, including but not limited to express provisions in a will." However, this presumption is different for multi-party accounts between spouses. In those cases the account is presumed to be joint with right of survivorship, unless it can be shown by clear and convincing evidence that this was not the intent of the party.

In an effort to simplify the terms of the account agreement and therefore demonstrate the actual intent of the decedent, the South Carolina legislature included an optional form, that when utilized by financial institutes and properly answered, can be used to demonstrate the intent of the parties, as least as of the date of creation. The form is as follows:

UNIFORM SINGLE-OR MULTIPLE-PARTY ACCOUNT FORM

PARTIES [Name One or More Parties]:

OWNERSHIP [Select One And Initial]:

_____ MULTIPLE-PARTY ACCOUNT

Parties own account in proportion to net contributions unless there is clear and convincing evidence of a different intent.

RIGHTS AT DEATH [Select One And Initial]:

If Multiple-Party Account is chosen above, choose one of following:

_____ MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP

At death of party, ownership passes to surviving parties. The last surviving party owns the entire account. (Note: This can be overridden by clear and convincing evidence of a contrary intent.)

_____ MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP AND POD (PAY ON DEATH) DESIGNATION

[Name One Or More Beneficiaries]:

At death of last surviving party, ownership passes to POD beneficiaries and is not part of last surviving party's estate.

_____ MULTIPLE-PARTY ACCOUNT WITHOUT RIGHT OF SURVIVORSHIP

At death of party, deceased party's ownership passes as part of deceased party's estate.

DESIGNATION OF AGENT FOR ACCOUNT [Optional]

Agents may make account transactions for parties but have no ownership or rights at death unless named as POD beneficiaries.

Joint Accounts (continued from page 7)

[To Add Agency Designation To Account, Name One Or More Agents]:

[Select One And Initial]:

_____ AGENCY DESIGNATION SURVIVES DISABILITY OR INCAPACITY OF PARTIES

_____ AGENCY DESIGNATION TERMINATES ON DISABILITY OR INCAPACITY OF PARTIES

The Section goes on to state that if this form is not utilized, the account will be “governed by the provisions of this article applicable to the type of account that most nearly conforms to the depositor’s intent.”

In *Abernathy v. Latham*, the Court of Appeals in South Carolina outlined that, “Section 62-6-104 [of the South Carolina Probate Code] establishes two means by which the right of survivorship of a joint account may be changed by the contributing party. The contributing party may either: 1) file a writing with the financial institution indicating a different intended distribution of the account proceeds; or 2) present clear and convincing evidence of a different intended distribution in her will.”

The *Latham* Court further outlined that, “if the joint account was created before the enactment of the Probate Code, the surviving account holders are entitled to all remaining sums unless there is a writing filed with the financial institution or there is clear and convincing evidence of a different intention at the time the account was created.” Thus, if the decedent did not file a writing with the financial institution making clear his or her intent, then the court must determine whether there is clear and convincing evidence of a contrary intention at the time that the accounts were created. In *Latham*, the decedent’s will was not sufficient to meet the burden of proof showing a clear and convincing indication of a contrary intent, because the will was drafted 10 years after the account was created and the respondents failed to provide any evidence of a contrary intent at the time of the account’s creation. Thus, the accounts in question were deemed to have survivorship rights as between the joint account holders.

However, in South Carolina, the presumption of ownership by survivorship in a multiparty account can be overcome if a will very specifically shows a contrary intent of the decedent, eg: if the Will makes specific mention of the account in question. Under Section 62-6-104(e), the right to survivorship may be changed by will, to the extent of the contributor’s ownership of a joint account under section 62-6-103(a), if the will contains clear and convincing evidence of the contributor’s intent to do so. In *Matthews v. Nelson*, a case from 1991, the South Carolina Supreme Court determined that the provisions in a will provided clear and convincing evidence to alter the right of survivorship. The Court explained that if the account was not mentioned in the will, the residuary clause alone would not be likely to control the distribution of the account. In *Estate of Chappell v. Gillespie*, a case from 1997, the Appeals Court in South Carolina addressed the application of Section 62-6-104(e) to a will that specifically did not make mention of the joint account in question.

The court concluded that despite the fact that witnesses gave testimony regarding the decedent’s intent, that given that the will did not mention the account nor specifically limit the joint account holder’s devise to that mentioned in the will, the appellants failed to overcome the presumption of the right of survivorship by clear and convincing evidence. The court stated that:

Vague testimony about what others believed the testator might have wanted is simply insufficient—the statute clearly requires that the evidence of the testator’s intent to alter the right of survivorship must be found in the will, not in the testimony of third parties about their perceptions of the testator’s intentions.

B. Colorado

In Colorado, according to Title 15 of the Colorado Revised Statutes, during the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit, unless there is clear and convincing evidence of a different intent. As between parties married to each other, in the absence of proof otherwise, the net contribution of each is presumed to be an equal amount.

Also, pursuant to Title 15 of the Colorado Revised Statutes, upon the death of one party to a multi-party account, unless as otherwise provided, the sums on deposit in that account belong to the surviving party or parties. If two or more parties survive, and one of those parties is the surviving spouse of the decedent, then the amount to which the decedent was beneficially entitled to immediately before death, and as outlined in Section 15-15-211 of the Revised Statutes, belongs to the surviving spouse. Thus, for example, if an account is held jointly as between decedent, his spouse, and one of their children, and decedent is shown to be the sole contributor of the funds to the account, then upon his death, his spouse is entitled to all of the account funds, to the exclusion of the child added to the account, since the spouse gets the benefit of all funds contributed to the account by the decedent.

It is worth noting that Colorado has adopted an altered version of the Uniform Multiple-Person Accounts Act, adding a Subsection 5 to Section 6-212 of that Act. In the added Subsection 5, the estate may prove ownership of the funds by clear and convincing evidence. In essence, although the statute allows for use of the model form for financial institutions to use, it also provides for the evidentiary burden of proof as seen in the original Uniform Probate Code.

In the case of *In re Estate of Beasley*, which was discussed by the court in *In re Estate of Sandstead*, 412 P.3d 799 (Colo. App. 2016), the decedent, prior to her death, opened two joint savings accounts in the names of herself and her two daughters. The accounts were established as joint, with rights of survivorship. The intent of the parties, at the creation of the accounts, was that in the event of the death of one of the parties, the other two parties would receive the entirety of the accounts. However, prior to the decedent’s death, one of her daughters withdrew substantially all of the funds in both accounts. Later, after the decedent’s death, the remaining daughter, who happened to be the personal representative, brought an action against the sister who took the funds, on

behalf of the estate. The court ultimately decided that the withdrawals by the one daughter did not destroy the joint tenancy of the account, and because of this, the funds were not property of the estate and therefore the estate did not have a claim to the funds.

C. California

According to Section 5130 of the California Probate Code, a joint account is defined as an “account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship.” Such provision goes on to clarify that funds still in the account upon the death of one of the parties to a joint account, “belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent.” They go on to state that a right of survivorship arising from the express terms of the account, “cannot be changed by will.” In California, once an account is designated as a joint account, it is presumed to be with rights of survivorship, and the Code sets out very specific methods to change this interest, including, *inter alia*: closing the account and reopening it under different terms; presenting the financial institution with a modification agreement signed by all parties with a present right of withdrawal; and pursuant to the terms of the account or deposit agreement allowing modification, if such terms exist.

An illustration of how these sections of code work together can be found in *Estate of O'Connor*, 224 Cal. Rptr. 3d 243 (Ct. App. 2017). In this case, the Court of Appeals discussed that in 1990, California adopted what was known as CAMPAL, the California Multiple-Party Accounts Law, which became the governing law regarding multiple-party accounts. Under CAMPAL, joint accounts are included. The Court went on to explain that the use of form language is not required in order to establish a joint account, “if the contract of deposit creates substantially the same relationship between parties as an account using the form language provided in Section 5203 [of the California Probate Code].”

In California, an account that is payable on the request of one or more of the parties is automatically treated as a joint account, even if there is no mention of any rights of survivorship unless the terms of the account or deposit agreement provide otherwise. In *O'Connor*, the Appellant sought to overturn the trial court’s ruling that no clear and convincing evidence existed to rebut the presumption of survivorship. More specifically, he pointed to the following facts: (1) there were no executed documents reflecting decedent’s intent to create joint accounts with the right of survivorship in favor of joint account owner and that further, a joint account could not be created orally; and (2) none of the unsigned documents produced by the financial institution indicated the creation of a joint account with the right of survivorship. The court nonetheless held that these factors were not sufficient to overcome the presumption of survivorship and affirmed the trial court’s ruling.

D. Ohio and Texas: Bright-Line Rule States

Several states have set out bright-line rules in which the survivorship interest is conclusive where terms in the contract of deposit designate the account as having a survivorship interest or the

language very specifically creates a survivorship interest. Conversely, the lack of such survivorship language is conclusive that the creator did not intend to create a survivorship account, and the account proceeds pass through to the estate. Both Ohio and Texas are bright-line rule states. In these states, the intent of the decedent is conclusively proven through the banking documents. A court sitting in Rhode Island described bright-line rule states best in *Robinson v. Delfino*, 710 A.2d 154, 160 (R.I. 1998), when the court observed that in Ohio and Texas, courts do not feel that it is up to the judiciary to “perform post mortem cerebral autopsies . . . to determine and second-guess what the subjective intent of the deceased joint owner of the account was at the time the account was created.” A notable difference among bright-line rule states relates to the requirement of statutory forms. Texas has adopted the use of the statutory form, while Ohio declined the adoption of a form.

In Ohio, multi-party accounts are to pass upon the death of one of the joint holders by the way in which the creator(s) listed their joint interest on the bank forms used to create the account. In *Wright v. Bloom*, 635 N.E.2d 31, 37 (Ohio 1994), the court held that the method in which a multi-party bank account is opened and the legal form set up at the creation of the account or the joint-interest is usually conclusive evidence as to how the account funds will pass upon the death of one of the parties. If the account is opened with the joint parties holding a joint and survivorship interest, then the account funds will pass directly to the surviving holder(s). However, if the account is opened without specifying survivorship interest, then the funds contributed by the decedent remaining in the account at the time of death will belong exclusively to the decedent’s estate. See *In re Grieger*, 172 B.R. 222, Bkrtcy.N.D. Ohio, 224. This conclusive determination can only be challenged when there is a claim of undue influence, coercion, fraud, duress, or mistake.

I. Ohio

The Ohio Court of Appeals illustrates the application of their conclusive treatment of joint accounts in *Weyand v. Barnes*, 945 N.E.2d 530 (2010). In this case, prior to the decedent’s death, she opened three bank accounts at three different banks. The first account was an already existing account where she added her grandson’s name (Keith), and her sister-in-law’s name (Betty). In the bank documents, this account was a joint account without a right of survivorship. The second account was also her already existing account where she added both Keith and Betty; however, this account was designated as a joint and survivorship account. The third account was actually a certificate of deposit that was in her name alone. She added Keith, Betty, and another grandson as payable on death beneficiaries. Right after her death, Keith withdrew all of the funds. A five-year litigation soon ensued. Ultimately, the Ohio Court of Appeals concluded, based on the Ohio rules as outlined in *Wright v. Bloom* and *In re Grieger*, that the first account was conclusively presumed to have no survivorship right accrued because there was no language specifying a survivorship interest. The result was the funds in that account should have passed to the estate. The second account was conversely decided under the same rules; the account was held conclusively to be a survivorship account because the survivorship interest was specified in the language of the bank documents and therefore one-half of the account should have

Joint Accounts (continued from page 9)

passed to Betty. The certificate of deposit was payable on death as specified in the banking documents, and Betty was entitled to one-third of the funds from that account.

2. Texas

In Texas, much like Ohio, the courts have deferred to the legislative body to resolve the issues surrounding joint account survivorship. A note to this is that in the late 1980's the citizens of Texas voted to add into their state constitution that "spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse."

Section 113 of the Texas Estates Code lists three requirements in order for a joint account to be deemed a joint account with a right of survivorship. First, there must be a "written agreement signed by the parties." Second, the signed written agreement must contain a statement that is substantially similar to the following: "On the death of one party to a joint account, all sums in the account on the date of the death vest in and belong to the surviving party as his or her separate property and estate." Finally, a survivorship agreement "may not be inferred from the mere fact that the account is a joint account"

An example of the Texas courts applying these requirements can be found in *Hare v. Longstreet*, 531 S.W.3d 922 (Tex. App. 2017), where the decedent added two individuals to his checking account, one being his son, Larry. Upon the decedent's death, the bank applied to the court, requesting that it be determined to whom the funds should be distributed. The court ultimately held that the account did not have survivorship rights, but rather the decedent's proceeds passed to his estate. The court relied heavily on the decisions of two cases: *In re Estate of Dellinger*, 224 S.W.3d 434 (Tex. App.—Dallas 2007, no pet.) and *Stauffer v. Henderson*, 801 S.W.2d 858 (Tex. 1990). The court determined that despite the fact that the decedent checked the block on the signature card that elected a joint account, with survivorship rights, and further, signed the signature card, the facts were still insufficient to establish that Larry had a survivorship interest in the funds. They held that the signature card did not contain language to the effect that upon the death of the decedent, the funds in the account would vest and belong to the surviving parties. And because this language or substantially similar language was missing, the court in *Hare* echoed the reasoning cited in the *Stauffer* case, "no presumption can be created . . . to supply a term wholly missing from its provisions." It is worth noting that if the same facts were presented to an Ohio court, a different outcome would likely have been reached, in favor of survivorship.

The court in *Hare* went on to discuss that the legislature had provided a statutory form that, if used, would have been sufficient to establish the joint account with rights of survivorship. The statutory form, as set out in Section 113.052 of the Texas Estates Code is as follows:

UNIFORM SINGLE-PARTY OR MULTIPLE-PARTY ACCOUNT SELECTION FORM NOTICE: The type of account you select may determine how property passes on your death. Your will may not

control the disposition of funds held in some of the following accounts. You may choose to designate one or more convenience signers on an account, even if the account is not a convenience account. A designated convenience signer may make transactions on your behalf during your lifetime, but does not own the account during your lifetime. The designated convenience signer owns the account on your death only if the convenience signer is also designated as a P.O.D. payee or trust account beneficiary.

Select one of the following accounts by placing your initials next to the account selected:

_____ (1) SINGLE-PARTY ACCOUNT WITHOUT "P.O.D." (PAYABLE ON DEATH) DESIGNATION. The party to the account owns the account. On the death of the party, ownership of the account passes as a part of the party's estate under the party's will or by intestacy.

Enter the name of the party:

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

_____ (2) SINGLE-PARTY ACCOUNT WITH "P.O.D." (PAYABLE ON DEATH) DESIGNATION. The party to the account owns the account. On the death of the party, ownership of the account passes to the P.O.D. beneficiaries of the account. The account is not a part of the party's estate.

Enter the name of the party:

Enter the name or names of the P.O.D. beneficiaries:

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

_____ (3) MULTIPLE-PARTY ACCOUNT WITHOUT RIGHT OF SURVIVORSHIP. The parties to the account own the account in proportion to the parties' net contributions to the account. The financial institution may pay any sum in the account to a party at any time. On the death of a party, the party's ownership of the account passes as a part of the party's estate under the party's will or by intestacy.

Enter the names of the parties:

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

_____ (4) MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP. The parties to the account own the account in proportion to the parties' net contributions to the account. The financial institution may pay any sum in the account to a party at any time. On the death of a party, the party's ownership of the account passes to the surviving parties.

Enter the names of the parties:

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

_____ (5) MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP AND P.O.D. (PAYABLE ON DEATH) DESIGNATION. The parties to the account own the account in proportion to the parties' net contributions to the account. The financial institution may pay any sum in the account to a party at any time. On the death of the last surviving party, the ownership of the account

Joint Accounts (continued from page 10)

passes to the P.O.D. beneficiaries.

Enter the names of the parties:

Enter the name or names of the P.O.D. beneficiaries:

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

_____(6) CONVENIENCE ACCOUNT. The parties to the account own the account. One or more convenience signers to the account may make account transactions for a party. A convenience signer does not own the account. On the death of the last surviving party, ownership of the account passes as a part of the last surviving party's estate under the last surviving party's will or by intestacy. The financial institution may pay funds in the account to a convenience signer before the financial institution receives notice of the death of the last surviving party. The payment to a convenience signer does not affect the parties' ownership of the account.

Enter the names of the parties:

Enter the name(s) of the convenience signer(s):

_____(7) TRUST ACCOUNT. The parties named as trustees to the account own the account in proportion to the parties' net contributions to the account. A trustee may withdraw funds from the account. A beneficiary may not withdraw funds from the account before all trustees are deceased. On the death of the last surviving trustee, the ownership of the account passes to the beneficiary. The trust account is not a part of a trustee's estate and does not pass under the trustee's will or by intestacy, unless the trustee

survives all of the beneficiaries and all other trustees.

Enter the name or names of the trustees:

Enter the name or names of the beneficiaries:

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

ACKNOWLEDGMENT: I acknowledge that I have read each paragraph of this form and have received disclosure of the ownership rights to the accounts listed above. I have placed my initials next to the type of account I want.

Signature

E. Conclusion

It is worth noting that although in many cases the decedent has the intent to create a non-probate transfer by adding a person or persons to an account, there are just as many countless others where such assets represent the entire estate and survivorship was not the goal. Given the consistent trend showing that the presumptions of survivorship are difficult to overcome, it seems that more conclusive bright line standards could save the courts and all interested parties a great deal of time and expense. Further, if viewed holistically, there is a strong argument against the use of the terms of the will to resolve questions of intent, since assets that fall under the umbrella of non-probate transfers are by definition, supposed to be outside the control of the will. Finally, and recognizing that it would take legislative acts to implement, it would make a great deal of difference if states mandated the account creation forms instead of granting their permissible use. ■

Lady Justice (continued from page 4)

With respect to the second issue involving refining courtroom styles to minimize the implicit bias female attorneys encounter, female attorneys should continue to develop their courtroom skills by going to workshops in which their presentations are critiqued. I am fortunate to be a member of the Miami-Dade chapter of the Florida Association of Women Lawyers (MD-FAWL), which provides an annual Trial Skills Workshop in which judges and accomplished litigators provide guidance and feedback during an interactive three-day learning period. The workshop was specifically developed to teach female attorneys trial skills to overcome gender bias in court. Being involved in female-oriented, voluntary bar associations can provide access to these types of programs. In addition to participating in these hands-on learning opportunities, female attorneys can use their everyday litigation opportunities to improve their trial skills. For example, treat a discovery deposition as a courtroom examination, or use a mediation presentation as a chance to highlight the themes of the case as would be done in an opening statement at trial. Further, volunteering for pro bono work creates courtroom opportunities especially in certain practice areas that have a high percentage of cases going to trial.

Law firms should encourage mentoring relationships between established female litigators and lesser experienced female attor-

neys, as effective mentoring is critical to the development and retention of female litigators. One of the judges interviewed in the 2004 Defense Resource Institute (DRI) task force stated, "mentoring is probably the most important consideration for law firms to develop female litigators." Firms should encourage experienced litigators to take female attorneys to the courtroom as often as possible, even if it is non-billable, so that they participate in "watch and learn" experiences. By creating a "we mentality," an effective mentor can help a female attorney navigate successfully in a male-dominated field.

Judges can assist female litigators both on and off the bench. They can mentor attorneys, advising them of what they did right in their argument and how they could have improved it. Spending just a few minutes giving feedback can make a world of difference in the confidence and encouragement of fellow female attorneys. Further, the involvement of judges in the voluntary bar associations providing trial skills workshops is invaluable. The insight provided from actual judges is what makes these programs successful at developing trial advocacy skills.

By working together with attorneys, firms, and the judiciary, the legal field can ensure that Lady Justice remains more than just a symbol, but rather an accurate representation of female roles as leaders in the courtroom. ■

“Judges can assist female litigators both on and off the bench. They can use their time after hearing an argument to mentor attorneys.”
